SETALI DEVELOPMENT SDN. BHD. & ANOR.

v.

LIM YOU KENG

FEDERAL COURT, JOHOR BAHRU
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 72 OF 1982]
19 OCTOBER 1983

CIVIL PROCEDURE: *Appeal - Application to dismiss - Failure to comply with s. 68(2) Courts of Judicature Act 1964, r. 56 Rules of the Federal Court 1980 - "Open Court" - Meaning of - Whether appealed in time.*

A notice of motion was taken out by the respondent in an appeal against a mandatory injunction granted by the Judicial Commissioner. The Judicial Commissioner had directed the parties to have the case heard in open Court under O. 32 r. 11(1) of the Rules of the High Court 1980 and after hearing the matter in open Court had given the order which expressly stated that it was an order made in open Court. The notice of motion was for an order to have the appeal dismissed on the grounds that the appellants had not complied with the provisions of s. 68(2) of the Courts of Judicature Act 1964 ("the Act") and rule 56 of the Rules of the Federal Court 1980 ("the Rules").

Held:

[1] The application for leave of the High Court did not have to be served on the respondent. Section 68(2) of the Act does not require such service as a condition precedent for an order and did not state that no leave would be granted in the absence of such service.

[2] The order of the Judicial Commissioner was an order made in open Court. It is expressly stated as such in the order itself. No leave is required under the amended s. 68(2) of the Act, from which section the word "interlocutory" found in the old s. 68(2) has been deleted. Further, though prior to the enactment of the Rules of the High Court 1980, all directions in open Court on a subject matter which originated from Chambers were deemed to be decisions in Chambers, such a deeming provision is absent from the present O. 32 r. 11 of the Rules of the High Court 1980.

[3] The notice of appeal was filed well within time. Under r. 151 of the Rules, the word "month" must be computed by calendar month according to the Gregorian calendar. The term "a calendar month" is a legal and technical term and the Courts are bound to interpret its legal and technical meaning. The Interpretation Act 1967, is applicable to the Courts of Judicature Act 1964 (revised 1972) and any rules made thereunder. (*Migotti v. Colvill* [1979] Vol IV CPD 233).

[Motion dismissed.]

Cases referred to:
T.O. Thomas v. K.C.I. Reddy & Anor. [1974] 2 MLJ 87
Migotti v. Colvill [1979] Vol IV CPD 233
Marren v. Dawson Bentley & Co. Ltd. [1961] 2 All ER 270

Legislation referred to:
Courts of Judicature Act 1964, s. 68(2)
Rules of the Federal Court 1980, rr. 56, 151
Interpretation Act 1967, ss. 2(1)(b), 54(1)(a)
Rules of the High Court 1980, O. 32 rr. 11, (1)
Rules of the Supreme Court 1979 [UK], O. 32 r. 13(1)(2)
Rules of the Supreme Court 1957, O. 54 rr. 22, (A)

Other sources referred to:
English Supreme Court Practice 1979, Vol. 1, pp. 12, 516, 527

For the appellants - S.C. Loh; M/s. Joseph Tan & Tang
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Hashim Yeop Sani FJ:

This is a Notice of Motion taken out by Mr. Karpal Singh, Counsel for the respondent in an appeal against a mandatory injunction granted by the learned Judicial Commissioner, Muar. The notice of motion seeks for an order to have the appeal dismissed with costs on the grounds that the appellants had not complied with the provisions of s. 68(2) of the Courts of Judicature Act 1964 and r. 56 of the Rules of the Federal Court 1980.

For convenience the provisions of the said s. 68(2) and r. 56 are reproduced below:

> **Section 68(2) of the Courts of Judicature Act 1964** - No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court.
>
> **Rule 56 of the Rules of the Federal Court 1980 -** No appeal shall, except by leave of the full Court, be brought after the expiration of one month -
>
> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced or when the appellant first had notice thereof;
>
> (b) in the case of an appeal against the refusal of an application, from the date of such refusal;
>
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

With regard to the allegation of non-compliance of s. 68(2) of the Courts of Judicature Act 1964, two grounds were raised. The first ground was as set out in the affidavit of Mr. Karpal Singh and that is that the application for leave of the High Court had not been served on the respondent or his solicitors. A short answer to this would seem to be simply that s. 68(2) of the Act does not say that the application for leave must be served as a condition precedent for an order and that no leave would be granted in the absence of such service. In any case the application for leave in this case was made *ex-parte* and there was no direction for service made by the learned Judicial Commissioner. Counsel for the respondent did not seem to pursue this ground seriously but much argument was however focussed on the appellants' contention that there was in fact no necessity to apply for leave at all in this case because the order appealed against was made in open Court and not in Chambers although the subject matter originated from an application in Chambers. For convenience O. 32 r. 11 of the Rules of the High Court, 1980 is reproduced below:-

11. (1) The Judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

(2) Any matter heard in Court by virtue of a direction under para. (1) may be adjourned from Court into Chambers.

It was the contention of the appellants that leave was applied for in this case out of caution as the solicitors for the appellants were not absolutely certain whether the order of the Judicial Commissioner dated 28 February 1982 was to be regarded as an order made in open Court although it is clearly stated at the top of the order to be an order in open Court. This uncertainty is understandable because of the difficulties encountered in the interpretation of the previous O. 54 r. 22 of old Supreme Court Rules 1957.

Section 68(2) of the Courts of Judicature Act 1964 and O. 54 r. 22A of the old rules attracted diverse opinions in the superior Court. See *T.O. Thomas v. K.C.I. Reddy & Anor.* [1974] 2 MLJ 87. The problem was further compounded by the word "interlocutory" in the old s. 68(2) of the Courts of Judicature Act. The position at present has been made somewhat less complicated firstly by the amendment to s. 68(2) of the Courts of Judicature Act which deleted the word "interlocutory" and secondly by the reenactment of the new O. 32 r. 11 of the new Rules of the High Court 1980. But apparently the spectre which haunted the old O. 54 rr. 22 & 22A has not totally disappeared and this obviously caused the uncertainty of the appellants when the application for leave was made to the learned Judicial Commissioner.

A careful reading of the former O. 54 r. 22 & 22A and the present O. 32 r. 11 would show that the order of the learned Judicial Commissioner (p. 907 of the Appeal Record) is an open Court order and expressly stated as such in the order itself. The present O. 32 r. 11 of the Rules of the High Court 1980 is a direct copy of the English O. 32 r. 13(1)(2) of the Rules of the Supreme Court 1979. Prior to the enactment of the Rules of the High Court 1980 all decisions in open Court on a subject matter which originated from Chambers shall under O. 54 r. 22 of the Rules of the Supreme Court 1957 be deemed to be a decision in Chambers. Such deeming provision is absent in the present O. 32 r. 11 of the Rules of the High Court 1980. There is thus a clear dichotomy now between orders in Chambers and orders in open Court in the new rules.

It is stated at p. 516 of the *English Supreme Court Practice* 1979 Vol. 1 that -

> The term 'Chambers' is not defined by the RSC but is used in contrast to the term 'Court' (see r. 13 & 20, *infra*). In fact applications and proceedings in Chambers are conducted before a Court sitting in private, more often before a Master or Registrar but occasionally before a Judge, and only the parties and their representatives are entitled to be present. The true distinction is between the Court sitting in Chambers, i.e., in private and the Court sitting in open Court, i.e., in public, though in the latter case the Court may in a proper case exclude the public so as to sit in camera (cf. Administration of Justice Act 1960, s. 12, Vol. 2, Part 9A, *infra*.)

Again at p. 527 the following note appears:-

> When a Judge adjourns a Chambers summons into Court under this Rule, and does not direct that it is to be heard in Court as Chambers, the matter is in Court for all purposes and is open to the Press.

There should not be any doubt arising from the expression "Judge in Chambers" appearing in O. 32 r. 11(1) of the Rules of the High Court 1980 and the expression "Judge of the High Court in Chambers" appearing in s. 68(2) of the Courts of Judicature Act 1964. The latter expression clearly means a Judge of the High Court while sitting in Chambers.

In this case the learned Judicial Commissioner directed the parties to have the case heard in open Court under O. 32 r. 11(1) and after hearing the matter in open Court gave the order which also expressly states that it is an order made in open Court. There is therefore no argument in this case that no leave was required under s. 68(2) of the Courts of Judicature Act 1964.

The other point taken up in the Nnotice of Motion was the alleged non-compliance of r. 56 of the Rules of the Federal Court 1980 in that the notice of appeal was allegedly filed out of time. Arguments on this point went off at a tangent due probably to the confusion between the definition and computation. The Courts of Judicature Act 1964 was revised in 1972. According to s. 2(1)(b) of the Interpretation Act 1967 that Act shall apply for the interpretation of all laws revised under the Revision of Laws Act 1968 whether the laws were enacted before or after the commencement of the Interpretation Act. Therefore it is clear that the Interpretation Act 1967 applies to the Courts of Judicature Act 1964 (revised) including any rules made thereunder. The order under appeal was made by the learned Judicial Commissioner on 28 February 1982. The notice of appeal was filed on 29 March 1982.

According to s. 54(1)(a) of the Interpretation Act 1967 "a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done". Under r. 151 of the Rules of the Federal Court 1980 the word "month" shall be computed by calendar month according to the Gregorian calendar. The phrase "calendar month" has been judicially considered in many authorities but we need only mention *Migotti v. Colvill* [1979] Vol IV CPD 233 where it was held that "a calendar month is a month which ended on the same date as it commenced on the previous month." Brett LJ in that case puts the principle clearly as follows at p. 238:

> I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days.

See also *Marren v. Dawson Bentley & Co. Ltd.* [1961] 2 ALL ER 270. Thus for example if an act is to be done within one month from 15 January the last date for doing the act is 15 February - see Note 2 O. 3 at p. 12 of the *English Supreme Court Practice* 1979 Vol. 1.

Since the order appealed against was made on 28 February 1982 the period of one month under r. 56 of the Rules of the Federal Court 1980 runs from 1 March 1982. The notice of appeal filed on 29 March 1982 was therefore filed well within time.

For the above reasons the motion is dismissed with costs. The appeal can now proceed on the merits.

Also found at [1983] 2 CLJ 250